90-1777

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE LOMAX,
Petitioner,

vs.

BILL ARMONTROUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER A PROSECUTOR, BY *NOLLE PROSEQUI* THE CASE DUE TO THE RACIAL COMPOSITION OF THE JURY AFTER THE JURY WAS EMPANELED BUT BEFORE IT WAS SWORN, VIOLATED PETITIONER'S EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT, UNLAWFULLY CIRCUMVENTED THIS COURT'S HOLDING IN *BATSON V. KENTUCKY*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), AND WHETHER AS A RESULT OF SUCH MISCONDUCT PETITIONER'S SUBSEQUENT PROSECUTION AND CONVICTION VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

LIST OF PARTIES TO THE PROCEEDINGS

All parties are fully listed in the caption.

Petitioner Leslie Lomax is currently an inmate in the Potosi Correctional Center, Mineral Point, Missouri, serving a sentence of life imprisonment without possibility of parole for fifty years.

Respondent Bill Armontrout is currently the Assistant Director of Adult Institutions for the Missouri Department of Corrections. At the time Petitioner filed his petition for writ of habeas corpus, Respondent was the Warden at the Missouri State Penitentiary.

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CITATIONS TO OPINIONS BELOW

The opinion of the three-judge panel of the Eighth Circuit Court of Appeals is printed in Appendix A hereto, infra, pages A-1 through A-5. The Order of the Court denying Petitioner's Petition for Rehearing or, in the Alternative, Motion for Rehearing by the Court En Banc is printed in Appendix B hereto, infra, page A-6.

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals for the Eighth Circuit was issued January 8, 1991. A timely Petition for Rehearing or Rehearing En Banc was denied on February 15, 1991. This

Petition is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner is a black man who, starting on August 3, 1981, was being tried for capital murder. The jury panel for the voir dire of Petitioner's first trial consisted of 42 blacks and 28 whites. (Transcript of Petitioner's Second Trial p. 438). The prosecutor during the voir dire of the panel, systematically struck black veniremen from this panel of prospective jurors. As set forth in the transcript of Petitioner's first trial (hereinafter "First Transcript"), during the phase of the voir dire that focused on potential penalties, the prosecutor struck twelve veniremen for cause; of those, eleven were black. (First Transcript, pp. 97-550). The prosecutor then used all of his peremptory challenges to strike nine more blacks from the jury panel. (First Transcript, p. 555). After defense counsel made his peremptory strikes, the jury comprised nine blacks and three whites. (First Transcript, p. 555). The jury was then seated in the jury box. However, before the court gave the jury its opening instructions, the prosecutor asked leave to approach the bench and filed a memorandum of *nolle prosequi*. (First Transcript, p. 555). The prosecutor gave *no* explanation or reason for this action. Petitioner's trial counsel objected to this action and stated:

> [Fabbri]:. . .The State is using this as a mechanism to avoid the impaneling of jurors that he may deem to be unfavorable. The panel consists of three males and six females, and three whites and *nine blacks*.
>
> That, I believe, is a mechanism whereby he can avoid a jury trial and select and determine that when a panel is inappropriate to him, that he may by his own unilateral act as this, thereby getting a panel, and can do this consistently until he achieves the panel of his liking.

The trial court, however, stated that although it wished the trial to continue, it knew of no way to block the prosecutor's actions. (First Transcript, p. 558). Petitioner was thereafter discharged.

On August 11, 1981, Petitioner was reindicted on the same charge of capital murder and was subsequently retried and found guilty. Petitioner was sentenced to life imprisonment without possibility of parole for fifty years. Petitioner's conviction and sentence were affirmed on appeal. *Missouri v. Lomax,* 712 S.W.2d 698 (Mo. Ct. App. 1986).

Petitioner subsequently filed a Writ of Habeas Corpus which was denied by the Honorable Carol E. Jackson, United States Magistrate. Thereafter, the Honorable John F. Nangle, District Court Judge, adopted the Recommendation and Review of Magistrate Jackson and denied Petitioner's Writ of Habeas Corpus.

Petitioner then filed an appeal in the Court of Appeals for the Eighth Circuit. The Eighth Circuit Court of Appeals upheld the denial of Petitioner's Writ of Habeas Corpus, finding: (1) that pursuant to Missouri law, a prosecutor has the sole discretion to enter a *nolle prosequi* without interference by the trial court; and (2) that because the *nolle prosequi* was entered before the jury was sworn, the subsequent prosecution of Petitioner did not place him in double jeopardy. *Lomax v. Armontrout,* 923 F.2d 574, 576 (8th Cir. 1991). The Eighth Circuit Court of Appeals, however, failed to address the *Batson* issue raised by Petitioner, mistakenly stating that Petitioner had failed to raise said issue in State Court or Federal Court. *Id.,* at 575, note 1.

On January 22, 1991, Petitioner timely filed his Petition for Rehearing or, in the Alternative, Motion for Rehearing by the Court En Banc, which was denied by the Eighth Circuit Court of Appeals on February 15, 1991.

JURISDICTION OF FEDERAL COURT

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1291.

REASONS FOR ALLOWANCE OF THE WRIT

WHETHER A PROSECUTOR, BY *NOLLE PROSEQUI* THE CASE DUE TO THE RACIAL COMPOSITION OF THE JURY AFTER THE JURY WAS EMPANELED BUT BEFORE IT WAS SWORN, VIOLATED PETITIONER'S EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT, UNLAWFULLY CIRCUMVENTED THIS COURT'S HOLDING IN *BATSON V. KENTUCKY*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), AND WHETHER AS A RESULT OF SUCH MISCONDUCT PETITIONER'S SUBSEQUENT PROSECUTION AND CONVICTION VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

The Eighth Circuit Court of Appeals concluded that in Missouri, a prosecutor has complete discretion to *nolle prosequi* an action and that it did not need to address the *Batson* issue raised by Petitioner because such argument had not been previously raised by Petitioner.

A. The Eighth Circuit Court of Appeals erred in not addressing the *Batson* issue raised by Petitioner because said issue was preserved in that Petitioner raised the prosecutor's misconduct at the first opportunity and throughout Petitioner's second trial and subsequent appeals.

In its opinion, the Court of Appeals stated that it did not address the *Batson* issue raised in Petitioner's brief because such

argument was not raised in any Court, state or federal. *Lomax v. Armontrout,* 923 F.2d 574, 575 n. 1 (8th Cir. 1991).

However, as stated in Petitioner's Petition for Rehearing, or in the Alternative, for Rehearing En Banc, at the end of the voir dire at his first trial (First Transcript pp. 555-558), at the start of his second trial, and continuing thereafter (Transcript of Appellant's Second Trial p. 312), Petitioner raised the fact that the prosecutor systematically struck black veniremen from the panel at his first trial, used all of his peremptory challenges to strike nine blacks from the jury panel, and filed a memorandum to *nolle prosequi* the action because he did not like the racial composition of the jury panel. It should be noted that Petitioner's first and second trials occurred in 1982, prior to this Court's holding in *Batson.* However, Petitioner specifically cited to *Batson* during the appeal process in State Court in his Motion for Rehearing and Application for Transfer from the Missouri Court of Appeals, No. 46893, May 13, 1986 (attached hereto as Appendix C) (hereinafter "Motion for Rehearing") (this point was raised just *two* weeks after the Supreme Court's holding in *Batson).* In Petitioner's Motion for Rehearing in the State Court of Appeals, Petitioner specifically raised the issue that the prosecutor's use of all of his peremptory challenges to strike nine black veniremen based solely on racial grounds and his filing of the memorandum to *nolle prosequi* the action because of the racial composition of the jury violated Petitioner's equal protection rights. As stated by Petitioner in his Motion for Rehearing and for Transfer:

> Since the Court's opinion, The United States Supreme Court is [sic] *Batson v. Kentucky,* No. 84-6263 decided that a prosecutor's peremptory challlenges [sic] to exclude from a jury members of the defendant's race solely on racial grounds violates the equal protection rights of both the defendant and the excluded jurors. The evidence showed that the state exercised nine peremptory challenges [as allowed in a Capital case] to strike nine black jurors

> resulting in an impaneled jury of nine blacks and three whites. *The state entered its memo of nolle prosequi.* Clearly the court should not ignore the events in the first Lomax trial in light of this opinion.

Motion for Rehearing, pp. 4-5 (emphasis added).

As shown above, clearly the Petitioner raised the *Batson* issue at his earliest opportunity and, further, specifically cited *Batson* within two weeks of the issuance of that decision. Therefore, it was clearly an error for the Eighth Circuit Court of Appeals to conclude that it need not address the *Batson* issue as raised in Petitioner's Brief because Petitioner had not previously raised this issue.

B. The Eighth Circuit Court of Appeals, by holding that a prosecutor has the complete discretion to *nolle prosequi* an action free from *any* review, allows prosecutors in Missouri, as in this case, the sole discretion to dismiss an action after the jury has been empaneled but before it is sworn simply because of the racial composition of the jury, in violation of Petitioner's Equal Protection rights and this Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Court of Appeals, by holding that a prosecutor in Missouri has complete discretion to *nolle prosequi* an action after the jury has been empaneled but before it is sworn, has left the actions of Missouri prosecutors *immune from constitutional review*. Under the Court of Appeals' holding, a prosecutor in Missouri may completely circumvent this Court's holding in *Batson* by dismissing an entire jury panel solely because of its racial composition, in violation of the Fourteenth Amendment rights of the defendant and members of the jury panel.

Further, the Court of Appeals, by holding that the Petitioner had not been placed in double jeopardy since the prosecutor entered the *nolle prosequi* after the jury was empaneled but before it was sworn, allows a Missouri prosecutor to go through the entire jury process, empanel the jury and then dismiss the prosecution because he does not like the racial composition of the jury, and then reindict the defendant and start over again and continue this nefarious process until he has empaneled what he considers a racially suitable jury, without having to worry about jeopardy attaching to the subsequent prosecutions, thereby depriving defendants of their rights under the Double Jeopardy clause of the Fifth Amendment to be free of repeated attempts to convict a defendant for the same offense.

This new scheme by prosecutors to systematically remove blacks from the jury panel and deprive defendants of their protections under the Double Jeopardy clause simply cannot be allowed to continue based solely on the Court of Appeals' holding that a prosecutor has unlimited discretion in Missouri to *nolle prosequi* an action.

Starting with this Court's decision in *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880), this Court has strived to rid the judicial system of racial discrimination throughout the juror selection process. In *Strauder*, a black man was indicted for murder in West Virginia and was subsequently tried and convicted by an all-white jury because a West Virginia statute prevented blacks from being members of a grand jury or a petit jury in the State.

This Court overturned the West Virginia statute, finding that it violated Strauder's Fourteenth Amendment rights. This Court found that under the Fourteenth Amendment, "[Strauder] was entitled to immunity from discrimination against him in the selection of jurors, because of their color. . . ." *Id.*, at 312. This Court further stated that the essence of a person's right to a trial

by jury is his right to be tried by those individuals having the same socio-economic class as the defendant. As stated by this Court:

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.

Id., at 308.

Following *Strauder*, this Court has consistently recognized that pursuant to the Fourteenth Amendment, a defendant has a right to a jury selection process that is *free from racial discrimination* and that "a State's *purposeful or deliberate* denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain v. Alabama*, 380 U.S. 202, 203-204, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965)(emphasis added). See also, *Hernandez v. Texas*, 347 U.S. 475, 477, 98 L. Ed. 866, 74 S. Ct. 667 (1954) ("[i]n numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State . . . ."); *Norris v. Alabama*, 294 U.S. 587, 589, 79 L. Ed. 1074, 55 S. Ct. 579 (1935)(citing *Carter v. Texas*, 177 U.S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687) (" '[w]henever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment . . . [citations omitted].' * * * The principle is equally applicable to a similar exclusion of negroes from service on petit juries.").

In *Batson*, 476 U.S., at 96-98, this Court, following the principles enunciated in *Strauder*, turned its attention to a far more subtle form of discrimination than the nefarious statute overturned in *Strauder*, namely, a prosecutor's use of his peremptory challenges to strike members of the defendant's race from the jury venire.

In reviewing the prosecutor's use of his peremptory challenges, this Court found that the protection afforded a defendant pursuant to the Fourteenth Amendment extended *throughout* the judicial process. As stated by the Court:

> The Constitution requires, however, that we look beyond the face of the statute defining juror qualifications and also consider challenged selection practices to afford "protection against action of the State through its administrative officers in effecting the prohibited discrimination."

Id., at 88 (citing *Norris v. Alabama*, 294 U.S. 589, 79 L. Ed. 1074, 55 S. Ct. 579 (1935)).

> [T]he Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, [citations omitted] the state may not draw up its jury lists pursuant to neutral proceedings but then resort to discrimination at "*other stages in the selection process*".

Id., at 88 (emphasis added) (citing *Avery v. Georgia*, 345 U.S. 559, 562, 97 L. Ed. 1244, 73 S. Ct. 891 (1953)). *See also, Swain v. Alabama*, 380 U.S. 202, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965) (the Court also determined that the principles set out in *Strauder* must be broadly applied).

Following the principle that the Equal Protection clause protects a defendant throughout all stages of the selection process, this Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be

unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S., at 89.

In the instant action, Petitioner submits that the prosecutor's actions are more egregious than those taken by the prosecutor in *Batson*. Not only did the prosecutor use his peremptory challenges to remove blacks from the panel, but he went one step further and used his purported prosecutorial discretion to *nolle prosequi* the case, in effect, striking the *entire* panel because of its racial composition.

As shown in the transcript of the voir dire of Petitioner's first trial, it is clear that the prosecutor based his rejection of jurors simply on their race. During the death penalty phase of the voir dire, the prosecutor struck twelve veniremen for cause; of those, eleven were black. (First Transcript, pp. 97-550). Further, the prosecutor used *all* of his peremptory challenges to strike an additional nine blacks from the panel. (First Transcript, p. 555). Clearly, under the standards established in *Batson*, the prosecutor's actions of striking veniremen solely because of their race clearly established a *prima facia* case of discrimination, in violation of the Fourteenth Amendment. However, the prosecutor in this case went *one step beyond* the actions taken by the prosecutor in Batson, for he not only used his peremptory challenges to strike blacks from the panel, but he used the purported prosecutorial discretion afforded him by the State to strike the *entire jury panel* because it contained too many blacks.

The Eighth Circuit Court of Appeals has held in this case that in Missouri, "'the prosecutor has sole discretion to enter a nolle prosequi without interference by the trial court in which the prosecution is pending.'" *Lomax v. Armontrout*, 923 F.2d, at 576 (citing *Missouri v. Clark*, 711 S.W.2d 928, 934 (Mo. Ct. App. 1986)). Petitioner disagrees with the Eighth Circuit Court of Appeals' interpretation of the Missouri law regarding a prosecutor's use of his prosecutorial discretion and submits that

a Missouri prosecutor does not have sole discretion to enter a *nolle prosequi* without interference by the trial court in which the prosecution is pending. *See, State ex rel. Norwood v. Drumm*, 691 S.W.2d 238, 240-41 (Mo. banc 1985). However, even if the Eighth Circuit Court of Appeals' interpretation was correct, under that Court's holding prosecutors in Missouri can continue to freely discriminate against defendants and jurors on racial grounds and *circumvent this Court's holding in Batson*. The Court of Appeals' decision places a prosecutor's actions completely out of reach of constitutional scrutiny and allows Missouri prosecutors to freely violate not only this Petitioner's rights under the Fourteenth Amendment, but the rights of any number of subsequent defendants and jurors.

C. The prosecutor's action in *nolle prosequi* the case for the purpose of avoiding the racial composition of the jury panel, after the jury was empaneled but before it was sworn in, was such blatant misconduct and so in violation of Petitioner's Equal Protection rights under the Fourteenth Amendment, that the Court should treat as done what the prosecutor wrongfully attempted to prevent, i.e., the swearing in of the jury — and accordingly, the Eighth Circuit Court of Appeals erred in not holding that jeopardy then and there attached.

The Eighth Circuit Court of Appeals erred when it failed to consider the prosecutor's racially motivated actions in entering the *nolle prosequi* and held that jeopardy did not attach in Petitioner's first trial since the prosecutor entered the *nolle prosequi* before the jury was sworn. As aforeshown, the prosecutor in this action carefully picked his time to enter the *nolle prosequi*. He waited until after Petitioner's trial counsel had used his peremptory strikes and the jury had been empaneled to see if the racial composition suited him, and then he entered the *nolle prosequi* before the jury was sworn. This allowed the prosecutor

to strike the entire jury panel due to its racial composition, thus violating the Fourteenth Amendment rights of Petitioner.

Petitioner submits that the prosecutor's violation of Petitioner's Fourteenth Amendment rights by striking an entire jury panel because of its race through the vehicle of *nolle prosequi* cannot be used to prevent jeopardy from attaching.

The Double Jeopardy Clause was established to prevent the government from having repeated opportunities to prosecute an individual for the same crime. As stated by this Court in *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957):

> [t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense . . . .

Id., at 187.

This Court, in *Downum v. United States,* 372 U.S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (1963) set out the parameters for when jeopardy attaches as follows:

> Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches.

Id., at 736.

This Court, in *Downum*, also stated that "the prohibition of the Double Jeopardy Clause is 'not against being twice punished; but against being twice put in jeopardy'." *Id.*, at 736 (citing *United States v. Ball*, 163 U.S. 662, 669, 41 L.Ed. 300, 302, 16 S. Ct. 1192 (1896)).

Petitioner recognizes that, as the Court of Appeals held and as the State of Missouri argued below, it is generally held that jeopardy does not attach until the jury is empaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 35, 57 L. Ed. 2d 24, 31, 98 S. Ct. 2156, 2160 (1978). However, there are holdings of this Court analogous to the case at bar which have found exceptions to the general rules of when double jeopardy attaches based, as in this case, on the prosecutor's actions. In *Wade v. Hunter*, 336 U.S. 684, 689, 93 L. Ed. 974, 69 S. Ct. 834, 837 (1949), this Court held that once a mistrial is declared, the Double Jeopardy Clause does not preclude a retrial. However, when a mistrial is prompted deliberately by the prosecutor in order that he may gain a more favorable opportunity to convict, this Court has found that the action of the prosecutor places the defendant in jeopardy, and, therefore, the defendant cannot be retried. *United States v. Dinitz*, 424 U.S. 600, 47 L. Ed. 2d 267, 96 S. Ct. 1075 (1976). As stated by this Court:

> [t]he Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor," [citation omitted] threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" . . . [citations omitted].

Id., at 611. See also, *Oregon v. Kennedy*, 456 U. S. 667, 670, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982) (retrial is barred where the error that prompted the mistrial is intended to provoke a mistrial or is motivated by bad-faith or undertaken to harass or prejudice the defendant).

So too as in this case, the prosecutor unlawfully prevented the jury from being sworn and this Court should follow *Downum*,

Dinitz and *Kennedy* and treat the facts as if the jury was sworn, thereby finding that jeopardy attached.

As was held in *Dinitz* and *Downum*, a prosecutor should not be able to profit from his misconduct of dismissing an action or causing a mistrial simply to gain a more favorable opportunity to convict a defendant. The prosecutor cannot wrongfully dismiss an action and then be allowed to argue that jeopardy did not attach in the first trial because he entered a *nolle prosequi* before the jury panel was sworn. Instead, the act should be treated as done which would have been done but for his misconduct, namely, the jury should be regarded as having been sworn so that jeopardy did attach. To rule otherwise would be to allow prosecutors to regularly circumvent this Court's rulings in *Batson, Dinitz*, and *Downum*, and would result in those decisions being for naught. Prosecutors will be able to go through the entire jury process, empanel the jury and then dismiss the prosecution because they do not like the racial composition of the jury as finally selected. Then they will be able to reindict the defendant and start over again. This gives the prosecution an immeasurable and unconstitutional advantage as it gives them potentially unlimited opportunities to "shop" for the "right" jury to convict a defendant.

In the instant case, the prosecutor should not be allowed to profit by his misconduct and thereby avoid the constitutional mandate against double jeopardy.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2327

Leslie Lomax,
Appellant,

v.

Bill Armontrout,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: October 12, 1990

Filed: January 8, 1991

Before MAGILL, Circuit Judge, HEANEY, Senior Circuit Judge and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Leslie Lomax appeals from the district court's denial of his petition for writ of habeas corpus. *See* 28 U.S.C. § 2254 (1988). On appeal, Lomax argues that the district court erred in finding that the state prosecutor did not abuse his discretion by filing a nolle prosequi after voir dire but before the jury was sworn, and in finding that he was not placed in double jeopardy by subsequent re-indictment and prosecution. We affirm.

Lomax was convicted of the capital murder of a St. Louis undercover police officer, and sentenced to prison for life

without possibility of parole for fifty years. Voir dire in his trial began on August 3, 1981, and ended on August 6. Before the jury was sworn, however, the prosecutor filed a nolle prosequi, which gave no reason for dismissal. Lomax contends that the prosecutor dismissed the case because he thought that too many blacks were left on the jury. Indeed, the record reflects that the prosecutor used all of his peremptory challenges to strike blacks.[1] Whatever the prosecutor's motivation, the trial court concluded that entry of the nolle prosequi was within the absolute discretion of the prosecutor. Lomax was re-indicted on August 11, 1981, and his resulting conviction was affirmed on appeal. *See State v. Lomax*, 712 S.W.2d 698 (Mo. Ct. App. 1986). He then filed a petition for writ of habeas corpus in the Eastern District of Missouri. The district court denied the petition on May 8, 1989, and Lomax filed a notice of appeal on July 28, 1989.

The state argues that because Lomax did not file a notice of appeal within thirty days of the district court's denial, we have no jurisdiction over this appeal. *See* Fed. R. App. P. 4(a). Following the district court's denial, Lomax filed a pro se petition for reconsideration, citing Fed. R. Civ. P. 59(a) & (b) in the caption, and arguing that the district court erred in its reliance on specified cases. The district court denied this motion on June 21, 1989, after concluding that it was not a motion for new trial under Rule 59(a). Instead, the court found it to be a Rule 60(b) motion. "Construing petitioner's motion as a Rule 60(b) motion, the Court concludes that petitioner is not entitled to relief." The

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[1] Lomax raises an indirect *Batson* argument for the first time on appeal. Citing *Batson v. Kentucky*, 476 U.S. 79 (1986), he argues "that the prosecutor's dismissal of a jury which contained nine blacks was a last ditch effort by the prosecutor to eliminate a jury due to its racial makeup." Brief for Petitioner at 13. Thus, "the prosecutor's actions clearly violate the *Batson* principles." *Id.* at 14. Because it does not appear that Lomax raised this argument before any court below, state or federal, we do not address it.

district court applied Rule 60(b) only by default; it first determined that the motion could not arise under Rule 59 because it was not served within ten days after entry of judgment. The motion was filed on May 19, 1989, more than ten days, according to the district court, after entry of judgment on May 8, 1989.

We think that the district court was mistaken in finding that the motion was not filed within ten days after entry of judgment. Fed. R. Civ. P. 6(a) provides that "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Not counting Saturday May 13, or Sunday May 14, the motion was filed nine days after the district court's denial. Thus, it cannot be said that the motion should be construed as a Rule 60(b) motion *because* it could not fall under Rule 59(e). Indeed, we construe the motion as one made under Rule 59(e). As such, it tolls the running of the appeal period. *See* Fed. R. App. P. 4(a)(4) (time of appeal shall run from the entry of the order denying a new trial or granting or denying any other such motion); *Sanders v. Clemco Indus.*, 862 F.2d 161, 168 (8th Cir. 1988).

Lomax, therefore, had thirty days from denial of the Rule 59(e) motion, on June 21, 1989, in which to file a notice of appeal. While the document styled "Notice of Appeal" was not filed until July 28, 1989, we have recently held, in *Turner v. Armontrout*, No. 90-1595, slip op. (8th Cir. Jan. 7, 1991), that a pro se application for certificate of probable cause can serve as a notice of appeal. *See* Fed. R. App. P. 3(c). In this case, petitioner filed a pro se application for certificate of probable cause on July 13, 1989, within thirty days of June 21, 1989.

Alternatively, we note that the Supreme Court held, in *Houston v. Lack*, 487 U.S. 266, 270, 276 (1988), that a pro se prisoner's notice of appeal is timely filed upon delivery to prison authorities for forwarding to the court clerk. The certificate of

service attached to Lomax's pro se notice of appeal is dated July 11, 1989, again, within thirty days of June 21, 1989.[2] Because Lomax's appeal was timely, we consider the merits.

Lomax raises only two arguments on appeal. He first argues that the prosecutor abused his discretion in filing the nolle prosequi after four days of voir dire, just before the jury was sworn. Missouri law is clear, however, that "the prosecutor has sole discretion to enter a nolle prosequi without interference by the trial court in which the prosecution is pending." *State v. Clark*, 711 S.W.2d 928, 934 (Mo. Ct. App. 1986). *Accord Simmons v. State*, 782 S.W.2d 771, 773 (Mo. Ct. App. 1989); *Jones v. State*, 771 S.W.2d 349, 351 (Mo. Ct. App. 1989); *State v. Mahany*, 748 S.W.2d 762, 765 (Mo. Ct. App. 1988). Lomax can only rely on federal cases construing Fed. R. Crim. P. 48, which provides that the government may dismiss an indictment only with leave of court. Whether Missouri law should be changed in this manner is for the Missouri legislature or the Missouri courts, not for a federal court on habeas review. *Cf. Lomax*, 712 S.W.2d at 700-03 (Pudlowski, J., concurring) (arguing for temperance of Missouri's rule giving prosecutor absolute discretion).

Lomax also argues that the re-indictment and subsequent prosecution violated the double jeopardy clause. As the magis-

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[2] Petitioner properly dispatched his notice of appeal and application for certificate of probable cause at the same time — both on July 11, 1989. (One was filed with the clerk on July 13, 1989, the other on July 28, 1989). As we noted in *Turner*, it is not proper procedure to wait until after a certificate of probable cause has been granted to file a notice of appeal. *Turner*, slip op. at 4 (citing *Latella v. Jackson*, 817 F.2d 12, 13 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988)). The rules provide only that an appeal cannot proceed "unless a district or a circuit judge issues a certificate of probable cause." Fed. R. App. P. 22(b). Rule 22(b) does not subvert the time limits of Rule 4(a). As in most habeas cases, the judgment appealed from in this case is the district court's denial of the petition, and, absent a Rule 59 motion, the period prescribed in Rule 4(a) runs from that date.

trate correctly concluded, however, jeopardy does not attach until the jury is sworn, which it had not yet been in this case. *See Serfass v. United States*, 420 U.S. 377, 388 (1975) ("In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn."). Because the nolle prosequi was entered before the jury was sworn, the subsequent prosecution of Lomax did not place him in double jeopardy.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2327EM

Leslie Lomax,
Appellant,

v.

Bill Armontrout,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

February 15, 1991

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 46893

STATE OF MISSOURI,
Respondent,

v.

LESLIE LOMAX,
Appellant.

MOTION FOR REHEARING AND APPLICATION FOR TRANSFER

JURISDICTION

The opinion of the Court was filed on April 29, 1986. A copy of this Motion has been mailed to the Attorney General and the Motion is filed within fifteen(15) days of the opinion.

GROUNDS

The opinion of the Court shows that material matters of law and fact were over looked or misinterpreted. The case also presents a question of general interest and importance.

1. The Court's opinion chooses to follow precedent as to when double jeopardy attaches in a trial. This is done without elaboration and like the cited opinions without rationale to show continued support for the premise that jeopardy attaches when the jury is selected and sworn. In the face of the state's action there is no logic for clinging to this standard. As the concurring opinion grasps, what the prosecutor did was "to deliberately circumvent a duly selected jury." (Slip op. p. 7). There can be no question this was an act of prosecutorial abuse and bad faith that destroyed the fundamental fairness of any further proceedings.

2. Even if the Court is reluctant to alter its view as to when double jeopardy attaches, it should reconsider its decision that these actions violated due process of law as raised by appellant. The abusive use of the nolle prosequi by the state although accepted in this state is contrary to the Federal Rules of Criminal Procedure and the prevailing law in most jurisdictions. The Court in its opinion characterizes the state's overreaching as academic in that no mistrial was requested. However, the transcript of the voir dire in the first trial reflects the following:

> MR. FABBRI: We will wait until that time. I would further move for a mistrial based on this prosecutor bringing up the word polygraph, connected to the fact that his State's witness's case was dismissed when he was given the polygraph.
>
> THE COURT: That motion will be overruled.
>
> Now you can go ahead, now, sir, Mr. Moss, after I make a statement.
>
> MR. MOSS: Excuse me —
>
> THE COURT: I beg you[sic] pardon, sir, I'm discussing a matter now. I will try to listen to you gentlemen, and if I interrupt you, I ask you to remind me I should not interrupt you. But, I'm going to insist that you do not interrupt me, and that you listen to me when I speak.
>
> Now, we're goint[sic] to do that gentlemanly, or we're going to do it the hard way. Because, keep in mind what I've told you gentlement[sic]; much as I want to try this case after all the effort we've all put into it, this Court's dignity and position, and the rules and laws of this State are going to be observed first, because they are more important in my mind than any single murder prosecution.
>
> Now, I understand that I'm going to permit you, now, to go and make a statement about Lonnie Moyers, if you wish.

No referencc to polygraph by you or by me; but before you do, I will say that the last statement you made just before we interrupted you, about Lonnie Moyers, should at this time be stricken from the record, and that they should disregard it.

Now, is it clear at this point how we are going to proceed, at least for the next many minutes? Anything else for the record, gentlemen?

MR. FABBRI: No, Your Honor.

THE COURT: Mr. Moss?

MR. MOSS: *I would join in Mr. Fabbri's Motion for a mistrial at this point.* (emphasis added)

THE COURT: You do that because you honostly believe —

MR. MOSS: No, I don't —

THE COURT: I haven't finished the question. Do you do that because you honestly believe the Appellate Court, the Supreme Court, will say the mention of that word in this voir dire will poison this jury?

MR. MOSS: I don't.

THE COURT: Then I'll have to hear your reason is.

MR. MOSS: But, I think he's asking for a mistrial, to make a record, when he really doesn't want one, is what I'm saying. So, I'm just putting him to the test. If he wants the mistrial, I'll agree to it now.

THE COURT: You're calling his bluff? Is that what it comes down to? If this were a game of bones, where we had three or four dollars on the table, where we were just betting, I guess we would do that.

MR. MOSS: I don't think it's appropriate to ask for the mistrial when the parties do not intend — when it's made just for the purpose of making a record, and not when it's really desired by the party.

THE COURT: You know, if I were a lazy man, I guess I'd say well, you both want a mistrial, we'll give it to you. After all, we've been trying for three days to get in the trial.

I know the attorney on the basis of a reasonable collection of personal experience; that attorney more than most men will not lie, especially in a court room. So, I assume these men want their mistrial.

MR. FABBRI: Your Honor, I would state for the record —

THE COURT: And, anyway, whether they're kidding me or not, kid — excuse me, that's a term of endearment, I mean nothing — whether they mean it or not, Mr. Moss, I'm not going to grant a mistrial just to call their bluff.

MR. FABBRI: Your Honor, I might indicate, I do mean it. The Court itself indicated that I ran here faster than I've ever run in my last seven years of my life, making the objection. I am, with the same fervor, moving for a mistrial. *I believe that the State invited me to make that objection, and the State is now saying that it's not true.* (emphasis added.)

MR. MOSS: No.

THE COURT: After you finish this speech, are you going to have another motion? Because I've granted your last one.

MR. FABBRI: I'll renew my motion.

The assistant circuit attorney did indeed "goad" counsel into making a request for mistrial as he saw the jury panel forming and sought to abort the trial by having defense counsel do it for him.

3. Since the court's opinion, the United States Supreme Court is[sic] Batson v. Kentucky No. 84-6263 decided that a prosecutor's peremptory challlenges[sic] to exclude from a jury members of the defendant's race solely on racial grounds violates the equal protection rights of both the defendant and the excluded jurors. The evidence showed that the state exercise nine peremptory challenges [as allowed in a Capital case] to strike nine black jurors resulting in an impaneled jury of nine blacks and three whites. The state entered its memo of nolle prosequi. Clearly the court should not ignore the events in the first Lomax trial in the light of this opinion.

CONCLUSION

WHEREFORE, Appellant moves the Court to rehear the matter pursuant to Rule 30.26 or, in the alternative, to transfer to the Supreme Court pursuant to Rules 30.27 and 83.02 and Section 10 of Article V of the Constitution of Missouri.

RESPECTFULLY SUBMITTED,

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